Supreme Court, U.S.
FILED

99 1069 DEC 2 3 1999

OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

THE MONTGOMERY COUNTY PUBLIC SCHOOLS AND MEMBERS OF THE MONTGOMERY COUNTY BOARD OF EDUCATION,

Petitioners,

v.

JEFFREY EISENBERG AND ELINOR MERBERG, ON BEHALF OF JACOB EISENBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Judith S. Bresler
REESE AND CARNEY, L.L.P.
10715 Charter Drive
Columbia, MD 21044
(301) 762-6210

Patricia A. Brannan*
Maree Sneed
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

* Counsel of Record

Counsel for Petitioners

87pp

QUESTIONS PRESENTED

1. Whether, contrary to the rulings in, *e.g.*, *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982) and *McDaniel* v. *Barresi*, 402 U.S. 39 (1971), as well as opinions of several courts of appeals, the court below erred in ruling that the Equal Protection Clause of the Fourteenth Amendment proscribes all voluntary action by public school authorities limiting student assignments or student transfers in order to avoid creating racially isolated schools, if a student's race is considered for that purpose.

2. Whether the constitutional prohibition of consideration of race in the student assignment context as identified by the Fourth Circuit is so clear that a court of appeals can determine the outcome of the strict scrutiny inquiry without development of a factual record or fact finding by the trial court concerning the existence of compelling state interests or the narrow tailoring requirement.

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are the Montgomery County, Maryland, Public Schools and members of the Montgomery County Board of Education. The current members of the Montgomery County Board of Education are Patricia O'Neill, President; Kermit V. Burnett, Vice President; Stephen N. Abrams; Reginald M. Felton; Beatrice B. Gordon; Nancy J. King; Mona M. Signer; and Laura Sampedro, Student Member. The Complaint named then–Superintendent of Schools, Dr. Paul Vance, as a defendant in his official capacity. The current Superintendent of Schools is Dr. Jerry D. Weast.

Respondents, plaintiffs below, are Jeffrey Eisenberg and Elinor Merberg, on behalf of Jacob Eisenberg.

All parties are either individuals or governmental entities with no parent companies or nonwholly owned subsidiaries to be disclosed pursuant to Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

INTRODUCTION 2

STATEMENT OF THE CASE 3

A. The Transfer Request at Issue 3

B. The Complaint and Motion for Preliminary Injunction 6

C. The District Court Decision 9

D. The Fourth Circuit Decision 12

REASONS FOR GRANTING THE WRIT 14

A. The Fourth Circuit's Decision Effectively Outlawing Consideration of Race in School Assignments Conflicts With Decisions of Both This Court and Other Courts of Appeals. 15

B. The Fourth Circuit Decision Replaces Strict Scrutiny With *Per Se* Invalidation of Student Assignment Decisions That Take Race Into Account. 22

TABLE OF CONTENTS—Continued

Page

C. The Fourth Circuit Decision Leaves School Administrators With Conflicting Guidance on Factors That May Be Considered in Student Assignment, a Basic Area of School District Operation, Making This Court's Intervention Necessary. 27

CONCLUSION 30

Appendix A:

Opinion of the United States Court of Appeals for the Fourth Circuit (Oct. 6, 1999, as corrected Nov. 19, 1999) 1a

Appendix B:

Memorandum Opinion and Order of the United States District Court for Maryland (Sept. 8, 1998) 21a

Appendix C:

Exhibits A (Declaration of Dr. Marlene Hartzman) and B (Declaration of Dr. Mary Helen Smith), submitted with Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction (filed Aug. 21, 1998) 32a

Appendix D:

Order of the United States District Court for the District of Maryland (Dec. 3, 1999) 41a

Appendix E:

Tables of Choice and Charter School Statutes..... 43a

TABLE OF AUTHORITIES

Page

CASES:

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995) 22,24

Belk v. *Charlotte-Mecklenburg Bd. of Educ.*, No. 99-2389 (4th Cir) 22

Berman v. *Clark County Sch. Dist.*, No. CV-5-98-01279-HDM (D. Nev.) 22

Board of Educ. of City of New York v. *Harris*, 444 U.S. 130 (1979) 17

Board of Educ. of Oklahoma City Pub. Schs. v. *Dowell*, 498 U.S. 237 (1991) 29

Boston's Children First v. *City of Boston*, 99 CV 11330NG (D. Mass.) 22

Braxton v. *United States*, 500 U.S. 344 (1991) 22

Brewer v. *West Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619 (W.D.N.Y. 1999), *appeal pending*, No. 99-7186 (2d Cir.) 20,22

Brown v. *Board of Education*, 347 U.S. 483 (1954) 4

Brown v. *Board of Education*, 349 U.S. 294 (1955) 19

Brown v. *Chote*, 411 U.S. 452 (1973) 26

Bustop, Inc. v. *Board. of Educ. of City of Los Angeles*, 439 U.S. 1380 (1978) 17

Bustop, Inc. v. *Board of Educ. of City of Los Angeles*, 439 U.S. 1384 (1978) 17

Capacchione v. *Charlotte-Mecklenburg Bd. of Educ.*, No. 99-2391 (4th Cir) 22

City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 10,24

Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449 (1979) 15-16

TABLE OF AUTHORITIES—Continued

Page

Comfort v. *Lynn Sch. Comm.*, 99 CV 11811NG (D. Mass.) 22

Crawford v. *Board of Educ. of City of Los Angeles*, 458 U.S. 527 (1982) 16

Crawford v. *Huntington Beach Union H.S. Dist.*, No. 814334 (Super. Ct. Cal. Orange Cty.) 22

Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 (1977) 29

Diaz v. *San Jose Unified Sch. Dist.*, 733 F.2d 660 (9th Cir. 1984) 18

Freeman v. *Pitts*, 503 U.S. 467 (1992) 29

Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 22,25

Hopwood v. *Texas*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) 15,20,21

Hunter ex. rel. Brandt v. *Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999), *petition for reh'g pending* 15,21,22

Jacobson v. *Cincinnati Bd. of Educ.*, 961 F.2d 100 (6th Cir.), *cert. denied*, 506 U.S. 830 (1992) 18

Kennedy v. *Silas Mason Co.*, 334 U.S. 249 (1948) 26

Keyes v. *School Dist. No. 1*, 445 F.2d 990 (10th Cir. 1971), *cert. denied in relevant part, decision modified in part on other grounds*, 413 U.S. 189 (1973) 18

Kromnick v. *School Dist. of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985) 18

Lee v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) 16

Manning v. *Hunt*, 119 F.3d 254 (4th Cir. 1997) 10

TABLE OF AUTHORITIES—Continued

Page

Martin v. *Philadelphia Sch. Dist*, 1995 WL 564344 (E.D. Pa. Sept. 21, 1995) 17-18

McDaniel v. *Barresi*, 402 U.S. 39 (1971) i,16

NAACP v. *Lansing Bd. of Educ.*, 559 F.2d 1042 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977) 18

North Carolina State Bd. of Educ. v. *Swann*, 402 U.S. 43 (1971) 14,15,19

Norwood v. *Harrison*, 413 U.S. 455 (1973) 11

Offermann v. *Nitkowski*, 378 F.2d 22 (2d Cir. 1967) 17

Palmore v. *Sidoti*, 466 U.S. 429 (1984) 19

Parents Ass'n of Andrew Jackson High Sch. v. *Ambach*, 738 F.2d 574 (2d Cir. 1984) 15,21

Parents Ass'n of Andrew Jackson High Sch. v. *Ambach*, 598 F.2d 705 (2d Cir. 1979) 21

Personnel Administrator of Mass. v. *Feeney*, 442 U.S. 256 (1979) 23

Podberesky v. *Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) 23

Reed v. *Rhodes*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980) 18

Regents of Univ. of Cal. v. *Bakke*, 438 U.S. 265 (1978) 16

Rosenfeld v. *Montgomery Cty. Pub. Schs.*, No. L-98-1793 (D. Md.) 22

San Francisco NAACP v. *San Francisco Unified Sch. Dist.*, Nos. C-78-1445 WHO, C-94-1445e WHO (N.D. Ca.) 22

Scott v. *Pasadena Unified Sch. Dist.*, No. CV 99-1323 (C.D. Cal.) 22

Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Tuttle v. *Arlington County Sch. Bd.*, 1999 WL 986773 (4th Cir. Nov. 1, 1999) ..... *passim*

United Jewish Orgs. of Williamsburgh, Inc. v. *Carey*, 430 U.S. 144 (1977) 16

University of Texas v. *Camenisch*, 451 U.S. 390 (1981) 26

Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) i,14,16,20

Wessman v. *Gittens*, 160 F.3d 790 (1st Cir. 1998)... 20

Willan v. *Menomonee Falls School Bd.*, 658 F. Supp. 1416 (E.D. Wis. 1987) 18

Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) ..... *passim*

CONSTITUTIONAL PROVISION:

U.S. Const. XIV amend., § 1 ..... *passim*

STATUTES:

20 U.S.C. § 1601(b) (1972) 17

20 U.S.C. § 3191, *et seq.*(1978) 17

20 U.S.C. § 7201, *et seq.* 17

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(a)(1) 11,12

28 U.S.C. § 1331 6

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d 2,6,18

42 U.S.C. § 2000d-6(a) 16

RULES AND REGULATIONS:

Fed. R. Civ. P. 65(a)(2) 8

Sup. Ct. R. 10(a) 14,22

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE MATERIALS:

145 Cong. Rec. H12798-801 (daily ed. Nov. 18, 1999) 28

H.R. 3424, 106th Cong., 145 Cong. Rec. H12392 (daily ed. Nov. 17, 1999) 28

OTHER AUTHORITIES:

Jomills H. Braddock II and James M. McPartland, *Social Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School And Employment Desegregation*, 19 J. of Black Studies 267(1989) 29

Robert L. Crain & Rita E. Mahard, *Research on Minority Achievement in Desegregated Schools*, in *The Consequences of School Desegregation* (Christine H. Rossell & Willis D. Hawley eds., 1983) 29

Digest of Education Statistics, 1998 (U.S. Dept. of Educ.) 27

William O. O'Hare & William H. Frey, *Booming, Suburban, and Black*, Am. Demographics (Sept. 1992) 28

Janet W. Schofield, *Review of Research On School Desegregation's Impact on Elementary And Secondary School Students*, in *Handbook Of Research On Multicultural Education* (James A. Banks ed., 1995) 28-29

William Trent, *Outcomes Of School Desegregation: Findings From Longitudinal Research*, 66 J. of Negro Educ. 255 (1997) 29

U.S. Commission on Civil Rights, *Racial Isolation In The Public Schools* (1967) 29

IN THE

Supreme Court of the United States

No. 99-

THE MONTGOMERY COUNTY PUBLIC SCHOOLS AND MEMBERS OF THE MONTGOMERY COUNTY BOARD OF EDUCATION,

Petitioners,

v.

JEFFREY EISENBERG AND ELINOR MERBERG, ON BEHALF OF JACOB EISENBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The Montgomery County, Maryland, Public Schools and members of the Montgomery County Board of Education petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on October 6, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. 1a-20a) is reported at _ F.3d _ (1999 WL 795652). That opinion reversed a decision of the District Court for the District of Maryland (App. 21a-30a), which is reported at 19 F. Supp. 2d 449.

JURISDICTION

The Court of Appeals for the Fourth Circuit issued its opinion and mandate and entered its judgment on October 6, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

INTRODUCTION

This case presents the Court with the question whether consideration of race in the assignment of students to public schools violates students' rights to the Equal Protection of the laws, even where necessary to avoid creating racially isolated schools or to provide racially and ethnically diverse schooling, which local officials have concluded is an important educational benefit for children. The Fourth Circuit's decision in this case imposes a bright-line rule that race cannot be considered in assignments of individual students because, in its view, even the limitation of transfers away from "neighborhood schools" to avoid racial isolation constitutes proscribed "racial balancing." Intervention by this Court is necessary because the Fourth Circuit's decision conflicts with decisions of this Court and cases in other courts of appeals establishing that local school officials have power to correct or avoid racial segregation. The severity of the Fourth Circuit's legal holding is demonstrated by the fact

that it entered final judgment on a preliminary injunction record, failing to analyze all the facts carefully, as this Court's cases require when applying strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The decision below follows a trend of federal court decisions striking down local voluntary public school student assignment programs designed to avoid racial isolation. This decision leaves school officials nationwide in further uncertainty and at legal risk in a basic and important area of school district operation of fundamental public importance. This Court should grant certiorari to resolve this growing conflict on an important issue of federal law.

STATEMENT OF THE CASE

A. The Transfer Request at Issue

The Montgomery County, Maryland, Public Schools ("MCPS" or the "District") has responsibility for educating over 125,000 children enrolled at 183 schools. App. 22a.[1] Students in the District generally are assigned to school based on their residence, through attendance area boundaries established for elementary, middle and high schools. App. 33a. MCPS makes exceptions to attendance area assignments for special assignment processes, such as special education placement or parental requests for student transfers. One purpose of student transfers is to permit attendance at MCPS magnet programs, which have a specialized curriculum focus or method of instruction. App. 33a. MCPS developed magnet school programs and the transfer policy, under the leadership of its elected Board of Education, with the educational goal of allowing parental choice among public schools and programs without creating racial isolation in schools. App. 39a. The MCPS Board of Education has concluded that racially isolated schools limit students' later ability to function successfully in interracial

[1] All school data in the Statement, unless otherwise indicated, is as of July 1998, prior to the preliminary injunction hearing. App. 35a.

settings and fail to prepare children adequately for the future. App. 40a.[2]

The transfer policy was the successor to policies adopted by MCPS as part of an agreement with the Office for Civil Rights of the United States Department of Education. App. 36a. The Office for Civil Rights investigated student transfers due to a parent complaint in 1980 that MCPS was causing resegregation by approving transfers of white students that increased minority enrollment proportions at sending schools. App. 36a.

For the 1998-99 school year, MCPS received approximately 3,500 transfer applications, the majority of which it granted. App. 35a. Jeffrey Eisenberg and Elinor Merberg applied to MCPS for a transfer of their son, Jacob Eisenberg, from Glen Haven Elementary School to Rosemary Hills Elementary School, which provides a math and science magnet program. App. 39a. The family's home is within a few blocks of Glen Haven, to which Jacob Eisenberg was assigned for first grade for 1998-99 pursuant to the MCPS attendance area policy. App. 33a.

As MCPS considered transfer applications for 1998-99, it had before it the following racial and ethnic composition information for 1997-98 (App. 35a-36a):

White	African American	Hispanic	Asian
	Glen Haven		
24.1%	40.5%	25%	10.1%
	Rosemary Hills		
66%	15.9%	13.8%	4.1%

Jacob Eisenberg was one of 19 white students—roughly the equivalent of a full classroom of white students—who

---

[2] MCPS, like all Maryland school districts, was racially segregated by law before *Brown* v. *Board of Education,* 347 U.S. 483 (1954). App. 36a. MCPS has never been the subject of school desegregation litigation; it has addressed racial isolation voluntarily. App. 36a, 39a.

applied for a transfer out of Glen Haven for the 1998-99 school year. App. 36a. The 19 students represented about 14% of Glen Haven's white students.

Pursuant to its established policy, MCPS considered each transfer request, including Jacob Eisenberg's, to determine whether: 1) school building space considerations at the sending and receiving schools supported the transfer; 2) the transfer would adversely affect the size of enrollment at the sending or receiving school; 3) boundary changes or other factors affecting school stability were imminent at either school; and 4) the transfer would have an adverse impact on racial or ethnic diversity at either school. App. 33a-34a. MCPS grants requests based on a verified personal hardship, overriding all other considerations including the impact on racial or ethnic diversity. App. 34a.

MCPS considers the race of a student seeking a transfer only if the proposed transfer would contribute to racial isolation at either the sending or receiving school. App. 34a. MCPS examines the racial and ethnic composition of each of its schools, and the history of enrollment over time, before beginning the transfer process. App. 34a. For Glen Haven, MCPS data showed not only that white enrollment was less than half of the District-wide white enrollment,[3] but that Glen Haven's white enrollment had dropped from 38.9% in 1994-95 to 24.1% in 1997-98, a decline averaging almost five percentage points per year. App. 35. It is only where the enrollment of a racial or ethnic group is substantially different (by more than 1.5 standard deviations) from the District-wide enrollment for that racial or ethnic group *and* the enrollment for the group at the school has moved for several years away from the District average, that race or ethnicity is considered at all for transfers to or from that school. App. 34a.

---

[3] The District's overall racial composition for 1997-98 was (App. 35a):

White	African American	Hispanic	Asian
53.4%	20.3%	13.2%	12.7%

As a result, for most MCPS schools, race is not a factor at all in considering transfers. App. 34a. MCPS does not limit its consideration of race to white students. App. 34a. Because a transfer could contribute to isolation of different racial or ethnic groups depending on the racial composition of the sending and receiving schools, students of any race or ethnic group may be denied a transfer depending on a variety of factors including diversity, absent any hardship. App. 34a.

No personal hardship was offered in support of Jacob Eisenberg's transfer application. App. 36a. MCPS denied Jacob Eisenberg's request to transfer to Rosemary Hills because the transfer would contribute to increasing racial isolation at Glen Haven. App. 36a. For the 1998-99 school year, MCPS denied the requests of 14 of the 19 white students seeking transfers out of Glen Haven; MCPS granted five of the requests because it verified a stated personal hardship. App. 36a. MCPS also denied requests to transfer from Glen Haven of three African-American students and one Hispanic student, because of conditions at the requested receiving schools.[4]

B. The Complaint and Motion for Preliminary Injunction

On August 14, 1998, Jeffrey Eisenberg and Elinor Merberg filed a Complaint on behalf of Jacob Eisenberg in the United States District Court for the District of Maryland, alleging that MCPS denied the transfer request on grounds of Jacob Eisenberg's race, in violation of his "rights under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution and 42 U.S.C. 2000d." Jurisdiction was invoked pursuant to 28 U.S.C. § 1331. The Complaint sought an order requiring MCPS "to admit Jacob Eisenberg before the beginning of the school year to first grade at Rosemary Hills"; an order prospectively prohibiting MCPS "from barring any person on the basis of race from

---

[4] *See* Memorandum to Members of the Board of Education from Paul L. Vance (Aug. 19, 1998), at 210 in the Joint Appendix submitted to the United States Court of Appeals for the Fourth Circuit.

competing for any transfer available through the school system"; compensatory damages in the amount of $20,000 and punitive damages in the amount of $100,000, along with attorneys' fees and costs.

With the Complaint, Mr. Eisenberg and Ms. Merberg filed a Motion for a Temporary Restraining Order and/or Preliminary Injunction. App. 23a. The Motion sought only "an immediate order from the court requiring defendants to enroll Jacob Eisenberg in Rosemary Hills Elementary School prior to August 31, 1998, the commencement of the school year."[5] Plaintiffs requested "an immediate hearing" "to ensure that defendants' violation does not prevent Jacob from starting the school year at Rosemary Hills together with all other first year students."[6] The requested relief would not harm MCPS, plaintiffs contended, because the transfer involved only "one white student" and "would not cause defendants to do anything differently with respect to their administration of admissions to county schools then [*sic*] they have been doing through the years."[7]

MCPS filed a brief in opposition, supported by affidavits of the MCPS administrators with responsibility for transfers and for curriculum and instruction. App. 32a-40a. MCPS also demonstrated that the Maryland State Board of Education, the highest education authority in the State, had upheld the transfer policy in five administrative appeals brought by individual students denied transfers on grounds that the transfers would contribute to racial isolation,[8] and that the Office for Civil Rights of the United States Department of Education in 1996 had rejected a parent complaint that the

---

[5] Motion for a Temporary Restraining Order and or Preliminary Injunction (Aug. 14, 1998) at 1.

[6] Memorandum in Support of Motion for a Temporary Restraining Order and or Preliminary Injunction (Aug. 14, 1998) at 3-4.

[7] *Id.* at 5.

[8] Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction (Aug. 21, 1998) at Exs. D-H.

transfer policy discriminates on the basis of race in violation of Title VI.[9]

Seven days after plaintiffs filed the motion, on August 21, 1998, the district court held the requested hearing. No party sought consolidation of the preliminary injunction hearing with trial on the merits. *See* Fed. R. Civ. P. 65(a)(2). The parties did not present testimony at the hearing. When asked by the court if he wanted to call witnesses, Mr. Eisenberg, representing the plaintiffs, said:

> We are not really here bringing some sort of broad challenge to the entire transfer policy or to other policies in Montgomery County. What we're really talking about here is the treatment that Jacob's application received at the hands of defendants. So, we're really only alleging that his . . . civil rights were violated, not some sort of broad attacks against the constitutionality of the transfer policy generally.[10]

When the court asked MCPS if it wished to submit evidence, it replied: "*[F]or purposes of the preliminary injunction*, we have attached affidavits . . . and we would submit on those."[11]

All parties agreed that strict scrutiny should be applied to the MCPS decision to deny the transfer.[12] The crux of Mr. Eisenberg's argument was that "the only compelling interest the government could ever have to use a racial classification is if it is to remedy a history of race discrimination and to remedy specific injuries caused by that discrimination . . . ."[13] Mr. Eisenberg "accept[ed] that the school

---

9 *Id.* at Ex I.

10 Transcript of Motions Hearing (Aug. 21, 1998) at 5.

11 *Id.* at 34 (emphasis added).

12 *Id.* at 8-9, 23.

13 *Id.* at 9.

district has a legitimate interest in trying to promote the stability of its different schools . . . ."[14]

The district court denied the request for a temporary restraining order from the bench, because such relief would last for only 10 days and did not appear to be warranted.[15] The court took the preliminary injunction motion under advisement, but asked for immediate notice when the Board of Education acted on an appeal of the transfer denial, which the Board was to hear on August 26.[16]

MCPS notified the district court on August 27, 1998, that the Board of Education had denied the appeal of the transfer request.[17] It further informed the district court that Jacob Eisenberg's parents had declined a transfer from Glen Haven to a foreign language immersion program at Rock Creek Forest Elementary School. MCPS had offered the transfer when a vacancy at Rock Creek Forest developed on August 25 and Jacob Eisenberg's name came to the top of the waiting list. MCPS offered the Rock Creek Forest transfer, although it denied the transfer to Rosemary Hills, because it conducts a lottery for admission to the Rock Creek Forest program without consideration of the usual transfer factors such as diversity.[18]

C. The District Court Decision

On September 4, 1998, the district court denied the motion for preliminary injunction. App. 21a-31a. Under the Fourth

---

[14] *Id.* at 29.

[15] *Id.* at 32-33.

[16] *Id.* at 33.

[17] *See* Supplement to Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction (Aug. 27, 1998) at 2.

[18] MCPS makes this exception to the transfer policy because of the small size of the language immersion program and the lack of any comparable program in regular attendance area schools, in contrast to the math and science program at Rosemary Hills, which is focused on subjects that are an integral part of the MCPS curriculum in every school.

Circuit's test for preliminary relief, *see Manning* v. *Hunt,* 119 F.3d 254, 263 (4th Cir. 1997), the court first considered the balance of hardships. The district court agreed with plaintiffs that violation of Jacob Eisenberg's constitutional rights is per se irreparable harm. The harm was slight, however, because he would be able to receive an education "very comparable" to Rosemary Hills at Glen Haven. App. 24a.[19] The court found the potential harm to the District, in contrast, to be "substantial," because relief for Jacob Eisenberg could lead to the grant of transfers for other similarly situated students, possibly compromising the effort to avoid "racial isolation among certain schools in the District [which] is appropriately of paramount concern to the District . . . ." App. 24a. Because the balance of hardships "slightly favors the District," the district court concluded that, to prevail, plaintiffs had to make a strong showing that they likely would succeed on the merits. *Id.*

In considering whether "the District can take race into account in deciding whether to approve voluntary transfer requests," the court subjected the transfer decision to "exacting scrutiny." App. 24a-25a. The court held that "[a] challenged policy or decision can survive such 'strict scrutiny' review only if it is justified by a 'compelling governmental interest' and is 'narrowly tailored' to accomplish that goal. *Richmond* v. *Croson,* 488 U.S. 469, 493 (1989) (plurality opinion)." *Id.* Two interests of the District were found sufficiently compelling to support the consideration of race in the transfer process: "promotion of a diverse student population" and "avoiding the creation, through District action, of segregative enrollment patterns that might themselves constitute violations of the law." App. 25a. If the District chooses to allow transfers, the court concluded that it "must of course do so without facilitating through its actions private conduct that leads to a

---

[19] The evidence before the court showed that while Rosemary Hills offers a science and math magnet program, Glen Haven provides the same basic curriculum with a special intensive reading program. App. 40a.

discriminatory environment." App. 27a-28a, citing *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971); *Norwood* v. *Harrison,* 413 U.S. 455, 465 (1973) ("[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish").

The court concluded that MCPS' consideration of race in the transfer process is likely "narrowly tailored" to achieve these goals. App. 28a. The "policy does not single out whites, African-Americans, or other minorities," but restricts transfers of whites out of some schools and African-Americans out of others. *Id.* "At a substantial number of schools, transfers are approved without consideration of the impact on race or ethnic makeup of the affected schools." *Id.* The court further found that "the policy is not rigidly applied – transfers out of a school are permitted" in the case of great need or hardship, *id.*, and MCPS reviews the transfer policy periodically and updates its data on each school annually. App. 29a. Because "the purpose of the plan is to ensure racial and ethnic diversity of the schools of the County, the [c]ourt cannot conceive of, and Eisenberg does not suggest, any race-neutral alternative to the policy." *Id.* The court further found that the denial of a preliminary injunction was in the public interest. App. 30a.

The court cautioned that the ruling on the narrow-tailoring issue was not a final resolution because evidence of the impact of the policy District-wide was not before it:

> The ultimate question of whether the program is sufficiently narrowly tailored to survive constitutional scrutiny should obviously await further factual development as to how the policy has, in fact, been implemented. [App. 30a.]

Plaintiffs noticed an appeal of the denial of the preliminary injunction, pursuant to 28 U.S.C. § 1292(a)(1).

D. The Fourth Circuit Decision

On October 6, 1999, a Fourth Circuit panel reversed. App. 1a-20. The court not only directed the entry of a preliminary injunction requiring MCPS to admit Jacob Eisenberg to Rosemary Hills, but—despite the fact that the appeal was of an interlocutory order pursuant to 28 U.S.C. § 1292(a)(1) and there had been no evidentiary proceeding or consolidation of the injunction proceedings with the merits by the district court—also finally disposed of the case, directing entry of a "final injunction requiring the school authorities in Montgomery County to reconsider the application of Jacob [Eisenberg] to transfer to the Rosemary Hills Elementary School magnet program without consideration of his race." App. 19a.

While the Fourth Circuit agreed with the district court that strict scrutiny analysis should be applied to the transfer program, it faulted the district court for failing "to adhere to . . . the presumption against race based classifications," App. 9a, and concluded that "*[t]here is nothing in the record to overcome this presumption.*" App. 10a (emphasis in original). The district court erred, the appellate panel concluded, in its analysis of whether the plaintiffs were likely to succeed on the merits "given that the record demonstrates that Montgomery County's transfer policy is not a remedial race-conscious policy." App. 11a. The court allowed that "race based classifications have been tolerated in situations where past constitutional violations require race based remedial action" but it did "not face that type of scenario in this case." App. 12a.

The court characterized the District's interests in diversity and in avoiding racial isolation as "one and the same." App. 12a. While the court acknowledged that it was "tempting to decide the general question of whether or not diversity is a compelling governmental interest," it claimed that it "resisted[ed] that temptation," "[h]owever persuasive the arguments, and however tantalizing the facts of this case are," because resolution of the issue was not essential to its decision. App. 15a n.20.

Instead, the court struck down "Montgomery County's use of racial classifications in its transfer decisions" as not narrowly tailored to the interest of obtaining diversity. App. 14a. The court felt compelled to "find" that the policy "is mere racial balancing in a pure form . . . ." App. 15a. The court characterized MCPS' annual review of the data concerning each school, and whether attention to race in transfers involving that school continued to be appropriate, as "Montgomery County's attempt to regulate transfer spots to achieve the racial balance or makeup that most closely reflects the percentage of the various races in the county's public school population." App. 17a. Exceptions for personal hardship do not "limit or narrow the transfer policy so that racial balancing is suddenly a narrow fit to achieve diversity." *Id.* While the court recognized that race or ethnic background is not the only factor MCPS considers in deciding transfer requests, "in Jacob [Eisenberg]'s situation, his race was the only factor that led to the denial of his request." *Id.* "It does not matter," opined the court, "that, as the County argues, 'at some schools, African-Americans are generally not allowed to transfer out' and that 'the policy does not single out whites, African-Americans or other minorities,'" because "a denial of transfer to African-Americans or other minorities on account of their race is no less unconstitutional than the denial to Jacob was here." App. 18a.

In summarizing its holding, the court reiterated that the transfer policy "is engaging in racial balancing," which the court previously had "held to be unconstitutional." App. 19a, citing *Tuttle* v. *Arlington County School Board*, 1999 WL 986773 (4th Cir. Nov. 1, 1999). "Added to the racial balancing is the fact that Jacob's transfer request was refused because of his race," a type of governmental action "presumed to be invalid and . . . subject to strict scrutiny." *Id.* The court ruled that "[n]othing in the record overcomes that presumption." *Id.*

Finally, the court concluded that it was "justified in requiring the entry of an injunction finally disposing of this

case without an evidentiary hearing because the record clearly establishes the plaintiff's right to an injunction and such a hearing would not have altered the result." App. 20a.[20] The court, *sua sponte,* issued its mandate along with its decision.[21]

REASONS FOR GRANTING THE WRIT

Whether a school district voluntarily can consider the race of students where necessary to avoid creating racial isolation raises "an important federal question" that should be definitively resolved by this Court. Sup. Ct. R. 10(a). MCPS, along with the other 433 school districts in the Fourth Circuit, is caught between this Court's teachings that school districts may take voluntary, race-conscious action to avoid creating racial isolation, s*ee, e.g.*, *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971), citing *Swann,* 402 U.S. at 16, and the Fourth Circuit's *per se* rule that a school district may not make enrollment decisions for individual students with any reference to race without transgressing a constitutional proscription of "racial balancing."

The Fourth Circuit's ruling is in conflict with decisions of other courts of appeals that permit school districts to take

---

[20] After oral argument in the court of appeals, Mr. Eisenberg and Ms. Merberg had filed a motion in the district court seeking retroactive consolidation of the preliminary injunction hearing, held 10 months earlier, with trial on the merits. The district court denied the motion, because "[t]he issues in this case are too great and too significant to the citizens and school officials in Montgomery County for this Court to expedite the entire case and, in effect, trivialize the importance of this case." *Eisenberg* v. *Montgomery County Public Schools,* Memorandum Opinion at 2 (D. Md. July 14, 1999).

[21] During the pendency of plaintiffs' appeal of the denial of the preliminary injunction, district court litigation proceeded. All claims for damages had been dismissed or withdrawn in the district court by the time of the Fourth Circuit's ruling. On remand, the district court entered the preliminary and final injunction order on December 3, 1999, App. 41a, which resolved the only remaining claims.

voluntary action to promote racial and ethnic diversity in classrooms. *See, e.g., Hunter ex rel. Brandt* v. *Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999), *petition for reh'g pending*; *Parents Ass'n of Andrew Jackson High Sch.* v. *Ambach*, 738 F.2d 574 (2d Cir. 1984). The decision also exacerbates a growing disarray among the courts of appeals about the methodology for analyzing governmental actions that overtly consider race. Like the Fifth Circuit in *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), the Fourth Circuit has carved out a category of race-conscious governmental action in education and created a bright-line rule that it is unconstitutional. This approach cannot be reconciled with this Court's recent strict scrutiny cases, which emphasize the careful fact finding that must underpin the analysis of a governmental practice that takes race or ethnicity into account.

The lower federal courts need this Court's guidance concerning the extent to which State and local judgment is constrained in assigning children to public schools, an issue of importance to nearly 15,000 public school districts nationwide and the millions of families they serve.

A. The Fourth Circuit's Decision Effectively Outlawing Consideration of Race in School Assignments Conflicts With Decisions of Both This Court and Other Courts of Appeals.

In 1971, the unanimous Court stated that because "school authorities have wide discretion in formulating school policy, . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *North Carolina State Bd. of Educ.*, 402 U.S. at 45, citing *Swann*, 402 U.S. at 16.[22] *See also Columbus Bd.*

---

[22] The *Swann* cases applied in the public school context the principle "recognizing the States' ability to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in the

of Educ. v. *Penick*, 443 U.S. 449, 488 (1979) (Powell, J., dissenting) ("constructive actions" such as magnet schools and encouraging transfers to achieve classroom diversity are "always open to school authorities"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 311-12 (Powell, J., announcing the judgment) (1978) (attaining a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education").

Washington v. *Seattle School District No. 1*, 458 U.S. 457 (1982), underscores that school districts may act on a purely voluntary basis to redress or avoid racial segregation. This Court struck down an initiative adopted by Washington voters that would prohibit a desegregation plan of the Seattle Public Schools, which had never been the subject of a federal or State mandate to desegregate. *Id.* at 460. The initiative violated the Fourteenth Amendment because it placed "substantial and unique burdens" on the efforts of minorities to seek schooling for their children in racially integrated settings. *Id.* at 470. *Accord, McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (reversing State court injunction prohibiting implementation of voluntary program to desegregate public schools); *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970) (New York statute prohibiting State education officials and appointed school boards from seeking "equality in attendance" by race in schools is denial of Equal Protection), *aff'd*, 402 U.S. 935 (1971). In *Crawford* v. *Board of Educ. of City of Los Angeles*, 458 U.S. 527, 535 (1982), the Court upheld a similar State law, in part because school districts retained their State-law obligation and power to desegregate.[23]

---

judgment), citing *United Jewish Orgs. of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 165-66 (1977) (reapportionment); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (school desegregation).

[23] These holdings are consistent with the long-standing efforts of Congress to achieve the national goal of elimination, reduction, or prevention of minority group isolation in elementary and secondary schools. *See* 42 U.S.C. § 2000d-6(a) (declaring as "policy of the United States" that the guidelines and criteria of the Civil Rights Act of 1964 "shall be applied uniformly in all regions of the United States" to

Bustop, Inc. v. *Board of Educ. of City of Los Angeles*, 439 U.S. 1380 (Rehnquist, Circuit Justice 1978), characterized as "novel" the arguments—made by parents trying to stop State court desegregation of the Los Angeles Public Schools—that "each citizen of a State who is either a parent or a schoolchild has a 'federal right' to be 'free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy.'" 439 U.S. at 1383. A wider range of desegregation can be undertaken under State authority, the opinion concluded, than can be required by federal courts:

> While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action. [439 U.S. at 1383 (emphases in original).]

Justice Powell denied a reapplication for the stay, for the reasons stated by then-Justice Rehnquist. *Bustop, Inc.* v. *Board of Educ. of City of Los Angeles*, 439 U.S. 1384 (1978).

Like other school districts around the country,[24] MCPS undertook race-conscious student assignment solutions,

---

"segregation by race, whether de jure or de facto" and "whatever the origin or cause of such segregation"). Congress articulated a closely related goal in the Emergency School Aid Act ("ESAA"), which provided financial assistance from 1975 to 1981 "to meet the special needs incident to the elimination of minority group segregation" and "to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools . . . ." 20 U.S.C., § 1601(b). (ESAA later was recodified at 20 U.S.C. § 3191 *et seq.* (1978).) Congress reaffirmed that purpose in its current program to combat racial isolation in public schools, the Magnet Schools Assistance Program, first adopted in 1988 and amended in 1994. 20 U.S.C. § 7201, *et seq.* *See Board of Educ. of City of New York* v. *Harris*, 444 U.S. 130, 141 (1979) (Congress "intended the limited funds it made available to serve as an enticement device to encourage voluntary elimination of [de facto as well as de jure] segregation").

[24] *See Offermann* v. *Nitkowski*, 378 F.2d 22, 24-25 (2d Cir. 1967) (upholding dismissal of challenge to Buffalo, New York school desegregation plan to correct de facto segregation); *Martin* v.

including creating magnet schools and reviewing transfer requests to determine if they would contribute to racial isolation, with the understanding that such conduct was permitted and, in some circumstances, may be required. Granting student transfers that create or exacerbate racial isolation invites legal challenges alleging intentional racial segregation in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. *See, e.g., Diaz* v. *San Jose Unified Sch. Dist.,* 733 F.2d 660, 670-71 (9th Cir. 1984) (departure from neighborhood school policy that permitted Anglo students to transfer to predominantly Anglo schools permitted inference of segregative intent); *Reed* v. *Rhodes*, 607 F.2d 714, 733-34 (6th Cir. 1979) (segregative intent inferred from, *inter alia*, district's actions in permitting transfers that had the "predictable result" of facilitating "student choices which would create or intensify racial segregation"), *cert. denied*, 445 U.S. 935 (1980); *NAACP* v. *Lansing Bd. of Educ.*, 559 F.2d 1042, 1051 (6th Cir.) ("[w]here the foreseeable and actual result of a transfer policy is to increase the racial identifiability of schools with large minority enrollment, continuation of the policy gives rise to a presumption of segregative intent"), *cert. denied*, 434 U.S. 997 (1977); *Keyes* v. *School Dist. No. 1*, 445 F.2d 990, 1001 (10th Cir. 1971) (segregative intent established in part by fact that "Anglo students were permitted to transfer to predominantly Anglo schools"), *cert. denied in relevant part, decision modified in part on other grounds,* 413 U.S. 189, 195 (1973).

The Fourth Circuit decision ignores these competing constitutional duties and puts school districts in the untenable

---

Philadelphia Sch. Dist., 1995 WL 564344 (E.D. Pa. Sept. 21, 1995) (upholding race-conscious denial of student transfer); *Willan* v. *Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416 (E.D. Wis. 1987) (upholding denial of student transfer in Wisconsin voluntary integrative interdistrict transfer program). *Accord, Jacobson* v. *Cincinnati Bd. of Educ.*, 961 F.2d 100 (6th Cir.) (upholding teacher assignment process to achieve proportions of teachers by race in each school), *cert. denied*, 506 U.S. 830 (1992); *Kromnick* v. *School Dist. of Philadelphia*, 739 F.2d 894, 903 (3d Cir. 1984) (same), *cert. denied*, 469 U.S. 1107 (1985).

position of contributing to racial isolation. This is far from a hypothetical concern in MCPS. The predecessor to the transfer policy at issue here was adopted to resolve a parent complaint with the Office for Civil Rights that MCPS was "resegregating" by allowing transfers of students without taking account of their race. Indeed, MCPS avoided school desegregation litigation by voluntarily adopting policies to meet such concerns.

MCPS now has been found in violation of the Fourteenth Amendment for doing precisely what this Court said in *Swann* it could do. This Court has acknowledged that school districts face a delicate balance between two "related constitutional duties [that] are not always harmonious." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (Powell, J., announcing the judgment). The first is the

> clear command from this Court, starting with *Brown* v. *Board of Education*, 349 U.S. 294 (1955), to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971). On the other hand, . . . public schools[ ] also must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed discriminations based on race." [*Id.*, quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984).]

Recent decisions in the lower federal courts, however, like this one, are pulling hard on one side of this dilemma and striking down any voluntary race-conscious school district activity in student assignment. Very recently, a different Fourth Circuit panel invalidated the magnet school assignment process used in Arlington County, Virginia, which was designed to create racially and ethnically diverse enrollments. *See Tuttle* v. *Arlington County School Bd.*, 1999 WL 986773 (4th Cir. Nov. 1, 1999). The panel in *Tuttle*, as here, flatly held that what it called "nonremedial racial balancing is unconstitutional." *Id.* at *5 (footnote omitted).

The First Circuit recently struck down the use of race as a factor in admissions for the Boston Latin School. *Wessman* v. *Gittens*, 160 F.3d 790 (1st Cir. 1998). Although less categorical in its condemnation of the use of race as one factor in student assignments, the First Circuit expressed its view that the "*Swann* dictum" is no longer good law, 160 F.3d at 796-97, and catalogued the confusion among the courts of appeals about whether this Court's more recent strict scrutiny cases undermine or reverse the earlier cases calling for deference to education authorities who elect to promote and foster racial and ethnic diversity in student enrollments. 160 F.3d at 797-800. The *Wessman* court could not reconcile *Hopwood,* 78 F.3d 932, which rejected any non-remedial consideration of race in law school admissions, with the fact that this

> Court and various individual Justices from time to time have written approvingly of ethnic diversity in comparable settings, *see, e.g., Wygant,* 476 U.S. at 315 (Stevens, J., dissenting); *Washington* v. *Seattle Sch. Dist. No. 1,* 458 U.S. 457, 472-73 (1982), or have noted that the issue remains open, *see Wygant,* 476 U.S. at 286 (O'Connor, J., concurring). [160 F.3d at 796.]

The Second Circuit has under advisement now an appeal from the grant of a preliminary injunction allowing a white student to transfer out of her public school in Rochester, New York, to attend a more heavily white suburban public school. *See Brewer* v. *West Irondequoit Cent. Sch. Dist.,* 32 F. Supp. 2d 619 (W.D.N.Y. 1999), *appeal pending,* No. 99-7186 (2d Cir.). The interdistrict transfer program involved was designed by the State of New York to alleviate racial isolation in metropolitan areas by permitting minority students voluntarily to transfer from cities to suburbs and white students to transfer from suburbs to cities. The district court concluded that the transfer program denied the right to Equal Protection of a white student living in Rochester who is not allowed to transfer to the suburbs:

> What emerges from the case law, especially the more recent case law, is the principle that classifications based

> SOLELY on race, in the absence of past identifiable governmental discrimination, are almost—if not absolutely—never permissible. [32 F. Supp. 2d at 631, *citing, inter alia, Hopwood,* 78 F.3d at 944.]

This recent trend in the case law on student assignment in elementary and secondary education runs counter not only to what educators had understood as this Court's teachings concerning their powers and duties, but the decisions in two other circuits allowing such race-conscious action in student assignment. Less than a month before the Fourth Circuit's decision in this case, the Ninth Circuit decided *Hunter*, 190 F.3d 1061, which reviewed a judgment after a trial on the merits and upheld consideration of race and ethnicity (as well as gender and family income) in the admission of students to an elementary school operated by UCLA's Graduate School of Education and Information Studies.

In addition, the Second Circuit has held that a New York City voluntary desegregation plan, approved by the State Commissioner of Education, that permits minority students at an overwhelmingly minority high school to transfer to schools with lower minority enrollments survives strict scrutiny. *Parents Ass'n of Andrew Jackson High Sch.*, 738 F.2d at 577, citing *Parents Ass'n of Andrew Jackson High Sch.* v. *Ambach*, 598 F.2d 705 (2d Cir. 1979). Parents of students at the high school claimed that the plan violated the Equal Protection Clause because it imposed a "racial quota" of minority students for potential receiving schools. 598 F.2d at 717. The Second Circuit accepted that a plan to promote lasting racial integration has a compelling purpose and that a school district may legitimately take account of "the unpleasant realities of population change and white flight when it seeks to *promote* integration." 598 F.2d at 719 (emphasis in original).

The results of the present case likely would have been different in the Ninth or Second Circuits, where the transfer policy would not have been deemed unconstitutional *per se* because it takes account of the race of students. For consideration of race in student assignments to be barred in

the Fourth Circuit but available elsewhere because it withstands strict scrutiny is a conflict that calls for this Court's resolution. *See* Sup. Ct. R. 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals"). School districts around the country are facing an onslaught of litigation concerning the use of race in the assignment of students to schools.[25] They should not be left to wonder what the law requires on a basic question that affects the learning conditions of millions of children.

B. The Fourth Circuit Decision Replaces Strict Scrutiny With *Per Se* Invalidation of Student Assignment Decisions That Take Race Into Account.

The strict scrutiny applied here by the Fourth Circuit was not only "'strict in theory but fatal in fact.'" *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 237 (1995), quoting *Fullilove* v. *Klutznick,* 448 U.S. 448, 519 (1980). In the court's analysis, MCPS' consideration of race in weighing Jacob Eisenberg's transfer request counted against MCPS in three ways:

First, because race was a factor, the court employed strict scrutiny (a principle with which MCPS agrees). App. 10a.

Second, the Fourth Circuit held, the district court should have applied a "presumption against race based

---

[25] In addition to the *Tuttle, Brewer* and *Hunter* cases, which still are pending, *see Belk* v. *Charlotte-Mecklenburg Bd. of Educ.* and *Capacchione* v. *Charlotte-Mecklenburg Bd. of Educ.*, Nos. 99-2389, 99-2391 (4th Cir.) (pending); *Rosenfeld* v. *Montgomery Cty. Pub. Schs.*, No. L-98-1793 (D. Md.) (pending); *Scott* v. *Pasadena Unified Sch. Dist.*, No. CV 99-1323 (C.D. Cal.) (pending); *Berman* v. *Clark County Sch. Dist.*, No. CV-5-98-01279-HDM (D. Nev.) (pending); *Comfort* v. *Lynn Sch. Comm.*, 99 CV 11811NG (D. Mass.) (pending); *Boston's Children First* v. *City of Boston*, 99 CV 11330NG (D. Mass.) (pending); *San Francisco NAACP* v. *San Francisco Unified Sch. Dist.*, Nos. C-78-1445 WHO, C-94-1445e WHO (N.D. Ca.) (pending); *Crawford* v. *Huntington Beach Union H.S. Dist.*, No. 814334 (Cal. Super. Ct. Orange Cty.) (pending).

classification." App. 9a. For that proposition, the court cited dicta in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979), which emphasized the stringency of the analysis used when government employs racial classifications. The Fourth Circuit treated the "presumption" as a shifting of the burden of proof, and condemned the MCPS transfer policy because MCPS had not created a record—in opposing a preliminary injunction motion involving a single student—to "*overcome this presumption.*" App. 10a (emphasis in original). The Fourth Circuit's insistence on a burden-shifting "presumption" is contradicted by this Court's requirement that "in 'reverse discrimination' suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated." *Wygant,* 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 277-78 (Powell, J., announcing the judgment) ("the ultimate burden remains with the employees [challenging a racial classification in a lay-off plan] to demonstrate the unconstitutionality of an affirmative-action program").

Third, the Court of Appeals held that the ultimate "evil of the system in place" was that race may become outcome-determinative: A student can be denied a transfer that would be granted to a student of another race. App. 18a. That race can become the deciding factor in a transfer request became an insurmountable obstacle to constitutionality. A separate basis for invalidating the policy, the court declared, is that it involves "racial balancing" which is "unconstitutional," citing *Tuttle*, 1999 WL 986773 and *Podberesky* v. *Kirwan,* 38 F.3d 147, 160 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995). App. 19a. *See* App. 20a (the policy suffers "the compound constitutional wrong of an invalid racially based transfer policy sustaining invalid racial balancing").

The Fourth Circuit's rules automatically invalidating the policy because it can result in denial of a transfer and was labeled "racial balancing" have no support in this Court's strict scrutiny cases. This Court has held, to the contrary, that there may be legitimate bases for considering race in

governmental decisionmaking; strict scrutiny is the means of "smoking out" which uses are legitimate and which are mere pretexts for discrimination. Justice O'Connor's opinion for the Court in *Adarand* explained that the fact that strict scrutiny is applied "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." 515 U.S. at 230. Indeed, this Court remanded in *Adarand* upon determining that strict scrutiny should be applied, so that the facts concerning narrow tailoring and the details of the complex contracting program at issue could be developed, although that scheme clearly considered the race of bidders. 515 U.S. at 237-39. The point of such careful examination, through "evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." 515 U.S. at 228.

For similar reasons, in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), the Court rejected the argument that "remedial" classifications should receive a relaxed level of scrutiny from the outset, because a court cannot know that a classification is remedial "without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis." 488 U.S. at 494-95. Four Justices supporting the judgment emphasized that, where a remedial justification is offered, "[p]roper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Id.* at 510 (O' Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.). *Accord*, *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment) (case-by-case determination rather than "a rule of automatic invalidity for racial preferences" is workable, in accord with precedent, and respects the responsibility of the political branches to act without being ordered to do so by a court).

Here, the Court of Appeals "assume[d]" that "diversity" is a compelling governmental interest. App. 13a. The Fourth Circuit further assumed that avoidance of racial isolation and "diversity" are the same thing, but did not address the fact

that Glen Haven will not only lose "diversity" but will become all-minority in the foreseeable future if transfer requests like Jacob Eisenberg's must be granted. The court thus failed to conduct a meaningful analysis of whether "the means chosen to accomplish the . . . asserted purpose [were] specifically and narrowly framed to accomplish that purpose." *Wygant*, 476 U.S. at 280. *Accord*, *Fullilove*, 448 U.S. at 480. The Fourth Circuit simply dismissed the District's preliminary injunction evidence on narrow tailoring because, the panel said, the District was engaged in "racial balancing" because race could still be outcome determinative in some instances. *E.g.*, App. 19a (fact that MCPS also denies transfer requests for African-American or Hispanic students to avoid racial isolation "does not matter" because "a denial of transfer to African-Americans or other minorities on account of their race is no less unconstitutional than the denial to Jacob [Eisenberg] was here").

That the Fourth Circuit's invalidation of the transfer policy rests on a rule of law and not on careful fact findings about the policy at issue is betrayed by the court's rush to judgment without awaiting any fact finding whatsoever in the trial court on the issues raised by the plaintiffs' prayer for a permanent injunction. The appellate court entered its own findings of fact, many of which are clearly erroneous and unsupported by the record.[26] The Fourth Circuit simply

---

[26] The Fourth Circuit's conclusion that MCPS administers the transfer policy "with an end toward maintaining [the District-wide] percentage of racial balance in each school," App. 15a, is clearly erroneous and unsupported by record evidence, since racial and ethnic composition is not reviewed at all for transfers in and out of many schools with racial compositions substantially different from the District-wide enrollment, because the student population is stable at those schools. *Cf.* App. 34a. It is only where the representation of a racial or ethnic group at a school is substantially different (more than 1.5 standard deviations) from the District as a whole, and exhibits a pattern of movement away from the District-wide average over time, that MCPS even screens transfers in or out of the school to determine whether they will contribute to racial isolation. App. 34a. The transfer policy thus works at the margins to protect against creation of racial isolation through the transfer process. The Fourth Circuit panel developed its own definitions to explain how the

concluded that an "evidentiary hearing . . . would not have altered the result," App. 20a, ignoring the district court's warning that further evidence would be required on the overall effect of the plan before a permanent injunction decision on the narrow tailoring issue. App. 30a. The preliminary injunction record lacked a full historical account of the evidence before MCPS when it adopted the policy, a record of the changes MCPS made in the policy over time as the result of experience and changed circumstances, information on the number of students denied transfers due to the impact on diversity, data on the impact of the denials on sending and receiving schools, and information showing the racial compositions of sending and receiving schools that would have resulted if such transfers had been granted. The limited record was the direct result of the plaintiffs' assertion that they were not seeking District-wide relief at the preliminary injunction stage.

In the context of a constitutional inquiry in which this Court has called for careful fact-finding, such expedited preliminary injunction proceedings simply should not serve as a launch pad for a decision on the merits. *See University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981) (because of the haste that is necessary to preliminary injunction proceedings and the resulting incomplete record, "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits"); *Brown* v. *Chote*, 411 U.S. 452, 456 (1973) (because preliminary injunction granted on scanty record, Court refused to decide merits of constitutional claim); *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) ("summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation,

---

District-wide student racial data is used in weighing transfers and criticized MCPS for the way it explained the process. App. 4a n.4. This is precisely the kind of confusion avoided by testimony and careful fact-finding.

contracting and practice"). That the Fourth Circuit saw no need for development of a factual record simply underscores that it has adopted a broad, bright line test in an area where the Court's decisions have emphasized the need for factual findings and careful procedures.

C. The Fourth Circuit Decision Leaves School Administrators With Conflicting Guidance on Factors That May Be Considered in Student Assignment, a Basic Area of School District Operation, Making This Court's Intervention Necessary.

The Fourth Circuit decision forces MCPS, if for educational purposes it favors some parental choice in student assignment, to contribute knowingly to racial isolation by allowing parents who live in the immediate neighborhood of a local school where their race is in the minority an unfettered opportunity to choose another school where their race is substantially in the majority. MCPS' basic student assignment policy supports children attending neighborhood schools. This is not a case in which a school district mandates that students attend schools outside of their neighborhoods in order to achieve a racial balance that reflects the overall district. By denying a transfer to Jacob Eisenberg, MCPS is trying to prevent use of its own student transfer process as a means for children to exit their neighborhoods, even if they thereby create racial isolation.

There simply is not enough room between the principle prohibiting racial segregation and a new principle prohibiting "racial balancing" to permit MCPS and other public school districts in the Fourth Circuit to operate consistently with the law. Public schools across the United States serve increasing numbers of racial minority and immigrant students.[27] The

---

[27] *See* Digest of Education Statistics, 1998 (U.S. Dept. of Educ.), Table 93 (distribution by race of enrollments in school districts with more than 15,000 students).

task of avoiding segregation is today as much a suburban as an urban challenge.[28]

At the same time, public school choice programs, configured in a wide variety of ways, are proliferating at the federal, State and local levels, to the point that choice is becoming unavoidable.[29] Congress recently attached to its major funding bill for elementary and secondary schools a requirement that students must be allowed to transfer out of designated low-performing schools. *See* H.R. 3424, 106th Cong., 145 Cong. Rec. H12392 (daily ed. Nov. 17, 1999) (enacted) (appropriating Title I funds with proviso that "local educational agencies shall provide all students enrolled in a school identified [as low-performing] with the option to transfer to another public school within the local educational agency, including a public charter school, that has not been identified for school improvement"). The low-performing school designation is expected to apply to more than 7,000 schools, that educate millions of students, next year. 145 Cong. Rec. H12798-801 (daily ed. Nov. 18, 1999) (statement of Rep. Goodling).

Like States and other school districts around the country, MCPS has made an educational judgment that giving parents the opportunity to exercise choice among public schools may create greater public satisfaction and hold educational benefits. MCPS also agrees with the substantial educational research verifying that school desegregation yields enhanced achievement for African-American students, especially when undertaken voluntarily and at the early elementary grades.[30]

---

[28] *See* William O. O'Hare & William H. Frey, *Booming, Suburban, and Black*, Am. Demographics (Sept. 1992) at 30.

[29] *See* App. 43a, listing 15 State statutes that permit or require public school choice within or between school districts. Public charter school legislation also generally permits parents to choose to enroll their children in publicly funded schools operated without certain State and local regulatory requirements. Thirty-seven States have passed public charter school legislation. Those statutes are listed in App. 44a-46a.

[30] *See, e.g.*, Janet W. Schofield, *Review of Research On School Desegregation's Impact on Elementary And Secondary School Students*,

Studies further demonstrate that children who have desegregated elementary and secondary schooling are more likely to choose integrated colleges, residential neighborhoods, and work places.[31]

These educational judgments should be accorded greater deference than they were shown by the Fourth Circuit's bright-line rule against consideration of race in student assignments. "'[L]ocal autonomy of school districts is a vital national tradition.'" *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992), quoting *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977). "Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Board of Educ. of Oklahoma City Pub. Schs.* v. *Dowell*, 498 U.S. 237, 248 (1991). Student assignment is one of the most difficult and important local school district functions. The Fourth Circuit decision nullifies school district authority to manage student assignment on the sensitive issue of the racial composition of schools within the Fourth Circuit, and conflicts with decisions in other courts upholding—or at least giving consideration to—such efforts by school districts elsewhere. School districts nationwide need this Court's definitive guidance on whether local school authorities have power to manage transfer processes so that they may give families the benefit of public school choice with safeguards that avoid inflicting on children a racially isolated classroom experience.

---

in *Handbook Of Research On Multicultural Education*, 597, 599-602 (James A. Banks ed., 1995); Robert L. Crain & Rita E. Mahard, *Research on Minority Achievement in Desegregated Schools*, 103, 109 (Christine H. Rossell & Willis D. Hawley eds., 1983); U.S. Commission on Civil Rights, *Racial Isolation In The Public Schools*, 91 (1967).

[31] *See* Jomills H. Braddock II and James M. McPartland, *Social Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School And Employment Desegregation*, 19 J. of Black Studies, No. 3, 267, 285 (1989); William Trent, *Outcomes Of School Desegregation: Findings From Longitudinal Research*, 66 J. of Negro Educ., No. 3, 255, 257 (1997).

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

Patricia A. Brannan*
Maree Sneed
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-8686

Judith S. Bresler
REESE AND CARNEY, L.L.P
10715 Charter Drive
Columbia, MD 21044
(301) 762-6210

* Counsel of Record

Counsel for Petitioners

December 23, 1999